National Labor Relations Board



Weekly Summary of NLRB Cases

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Children's Services International, Inc. (32-CA-21495-1; 347 NLRB No. 7) Salinas, CA May 22, 2006. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities. Chairman Battista and Member Schaumber reversed the judge and dismissed the allegation that the Respondent violated Section 8(a)(3) and (1) by laying off Aurora Urzua and Griselda Palafox because of their union activities. Member Liebman disagreed with her colleagues on this issue. [HTML] [PDF]

The Respondent runs child-care centers for low-income families and administers a state grant program for independent child-care providers and their clients. In April 2004, the Respondent learned that it would have a shortfall in the funds it received from the state for the upcoming fiscal year, which was to begin on July 1. Ruben Guajardo, the Respondent's human resources director decided that he could eliminate three positions if he merged the provider-contract and payout departments. The majority found that when Guajardo first notified Service Employees Local 817 about the identity of the employees slated for layoff, he justified their selection by reference to their qualification.

The Respondent sought to minimize training costs and disruption to the administration of the grant program. In order to accomplish this, the majority found that the Respondent's conduct in choosing Urzua and Palafox for layoff served that goal. It wrote:

We emphasize that it is not our objective to determine whether the Respondent's choice of Urzua and Palafox was the correct decision or that the Respondent used the best decision-making process. The Respondent may make its layoff decision on any basis it chooses, good, bad, or indifferent—as long as it is not an unlawful basis. . . . We are concerned only with discerning the sincerity of the Respondent's contention that the decision was not motivated by union animus.

Contrary to her colleagues, Member Liebman would adopt the judge's conclusion that the Respondent unlawfully selected Aurora Urzua and Griselda Palafox for layoff based on their union activities. She would also adopt his findings that the pretextual nature of the Respondent's rationale was shown by: (1) the Respondent's failure to consult Supervisors Alderete and Diaz regarding the relative qualifications of the various provider-contract and payout employees; (2) its disregard of Palafox's recent and highly positive employee appraisals; and (3) its disregard of Urzua's experience performing (for almost 20 years, some of the time singlehandedly), as well as supervising, the payout employees' work. She wrote: "the Respondent's definition of employees' 'qualifications' as only their recent experience working in the payout department seems designed simply to justify laying off Urzua and Palafox despite their seniority."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Service Employees Local 817; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Oakland, Jan 11-14, 2005. Adm. Law Judge Jay R. Pollack issued his decision April 19, 2005.

S.T.A.R., Inc., Lighting The Way (34-RC-2111; 347 NLRB No. 8) Norwalk, CT May 25, 2006. Chairman Battista and Member Schaumber, with Member Liebman dissenting, reversed the hearing officer and sustained the Employer's Objection 3, set aside the election of March 25, 2005, and directed a second election. The tally of ballots showed 74 ballots for and 47 ballots against, the Petitioner, New England Health Care Employees District 1199, with 4 nondeterminative challenged ballots. [HTML] [PDF]

Objection 3 alleged that the Petitioner tainted the election by communicating to employees that it would waive initiation fees for only those employees who actively supported the Union. During the critical period before the election, Union Agent Ariel Lambe gave a brochure to employee Michael Gallo. In relevant part, the last page of the brochure provides: "There is a one-time \$50 initiation fee. *Workers who organize to join 1199 are exempt*, and begin paying dues once a contract is won." [Emphasis added.]

On his own initiative, Gallo gave the brochure to Supervisor Linda Snell, who, in turn, gave it to the Employer's executive director Katie Banzhaf. Banzhaf photocopied the last page of the brochure and placed a copy in each employee's mailbox approximately 2 to 3 weeks before the election. The facts revealed that at some point before Lambe had given the brochure to Gallo, the Petitioner described its fee-waiver policy at an organizing meeting where about 18 of the 136 unit employees attended. Union Agent David Pickus explained to the employees in attendance that "there is no initiation fee for anyone working at the facility before [the Petitioner] obtains a contract." He also told them that only employees hired by the Employer after the Petitioner won a contract would pay the initiation fee. Pickus informed Gallo by telephone that "you don't pay any dues until we get a contract, there is no initiation fee, that's the policy of the Union, as stated in the Union's bylaws."

Citing *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), the majority wrote: "A union interferes with free choice when it offers to waive initiation fees for only those employees who manifest support for the union before an election." Chairman Battista and Member Schaumber disagreed with the hearing officer's finding that the Petitioner adequately clarified its fee-waiver policy, stating: "The Board does not presume dissemination of a union's clarifications of an ambiguous offer to waive fees." The majority found that the coercive brochure was "corrected" for only about 19 employees and that the brochure was the sole source of information about initiation fees for as many as 117 employees.

In dissent, Member Liebman wrote that the Petitioner's only objectionable conduct was giving one employee, Michael Gallo, an ambiguously-worded brochure that arguably ran afoul of the *Savair* rule with respect to the waiver of initiation fees. She found that the Petitioner's actual fee-waiver policy was entirely lawful and that all of its other communications on the subject were proper. Member Liebman further found that the Petitioner did clearly publicize its lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they signed cards and apparently explained that policy to every employee with whom it had direct contact—including Gallo, the only employee who received the ambiguous brochure from the Petitioner. She contended that setting aside the election unfairly punishes the Petitioner and the employees who supported it for conduct over which they had no control.

(Chairman Battista and Members Liebman and Schaumber participated.)

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Cable Tech, Inc. (Electrical Workers [IBEW] Local 1547) Anchorage, AK May 22, 2006. 19-CA-29872, 29909; JD(SF)-25-06, Judge John J. McCarrick.

Pacific Neon Co. (Electrical Workers [IBEW] Local 340) Sacramento, CA May 22, 2006. 20-CA-32537; JD(SF)-27-06, Judge Gerald A. Wacknov.

Basic Industries, Inc. (Asbestos Workers Local 53) Baton Rouge, LA May 23, 2006. 15-CA-17525, et al.; JD(ATL)-22-06, Judge Keltner W. Locke.

Foster Poultry Farms (League of Independent Workers of the San Joaquin Valley, Local 2005 a/w Machinists Lodge 190) Livingston, CA May 23, 2006. 32-CA-22292-1; JD(SF)-26-06, Judge Clifford H. Anderson.

Asbestos Workers Local 84 (DST Insulation, Inc.) Bedford, OH May 24, 2006. 8-CB-10424; JD-35-06, Judge Karl H. Buschmann.

Oaktree Capital Management (UNITE HERE Local 5) Honolulu, HI May 24, 2006. 37-CA-6601-1, et al.; JD(SF)-23-06, Judge Joseph Gontram.

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

PDM Steel Service Centers, Inc., Santa Clara, CA, 32-RD-1490, May 24, 2006 (Chairman Battista and Members Kirsanow and Walsh)

DECISION, ORDER AND DIRECTION OF THIRD ELECTION

Greyhound Lines, Inc., Pittsburgh, PA, 6-RD-1553, May 24, 2006 (Chairman Battista and Members Kirsanow and Walsh)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

- Durham School Services, LP, St. Louis, MO, 14-RC-12604, May 24, 2006 (Chairman Battista and Members Kirsanow and Walsh)
- Marine Spill Response Corp., Tacoma, WA, 19-RC-14820, May 24, 2006 (Chairman Battista and Members Kirsanow and Walsh)
- US Protect Corp., San Francisco, CA, 20-UD-442, May 24, 2006 (Chairman Battista and Members Kirsanow and Walsh)
- Blue Man Vegas, LLC, Las Vegas, NV, 28-RC-6440, May 25, 2006 (Members Kirsanow and Walsh; Chairman Battista dissenting)
- Guardsmark LLC, Dearborn, MI 7-RC-22970, Dearborn, MI, May 25, 2006 (Chairman Battista and Member Walsh; Member Kirsanow dissenting)

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Children's Services International, Inc. and Service Employees International Union, Local 817.¹

Case 32-CA-21495-1

May 22, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 19, 2005, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.

I. FACTS

A. Background

The Respondent, which was founded by Jean Miner, runs child-care centers for low-income families and administers a state grant program for independent child-care providers and their clients. In 2002, following a Board-conducted election, the Union was certified as the representative of two units of the Respondent's employees. One unit comprised those employees who worked in the Respondent's child-care centers. This unit is referred to as the center-based unit. The other unit comprised those employees who administered the state grant program. This unit is referred to as the administrative unit. The parties executed one collective-bargaining agreement covering both units for the period of October 1, 2002 through September 20, 2004.

The administrative unit consisted of the three departments that administered the state grant program—eligibility, provider-contract, and payout. The eligibility department was responsible for enrolling families who needed subsidized child care. The provider-contract department was responsible for enrolling child-care provid-

ers into the program. The payout department was responsible for calculating payment for enrolled child-care providers. Prior to 1999, all the administrative functions had been handled by a single department.

The provider-contract department included employees Aurora Urzua, Griselda Palafox, and Roxanne Segobia, and was supervised by Sylvia Alderete (who also supervised the eligibility department). Urzua was the most senior employee in the administrative unit, having worked in the unit when all the functions were in one department. Palafox joined the provider-contract department in 1999. In 2001, Segobia joined the payout department, and she transferred to the provider-contract department in 2003.

B. Miner's April 14 Meeting

In late 2003, a center-based employee filed with the Board a petition to conduct an election to decide whether to withdraw the Respondent's authority to enforce the parties' union-security clause for the center-based unit. In early 2004, prior to the deauthorization election, the Union produced a flyer that was highly critical of Jean Miner. In the April 1, 2004 deauthorization election, the employees voted to continue to authorize the union-security clause.

On April 14, Miner held a meeting with the administrative unit employees to discuss the flyer. As employees entered the meeting, she gave each a copy of the flyer. When Palafox refused to take a flyer, Miner responded that Palafox did not need one because she had created the flyer. Palafox denied Miner's accusation. During the meeting, Miner expressed her extreme displeasure with the circulation of the flyer. She told employees that she had been through their personnel files, knew they were uneducated, and believed that working for the Respondent was the best job they were ever going to have and that they were lucky to have those jobs. After Segobia, Urzua, and Palafox asked for and received permission to leave the meeting, Miner continued the meeting, refuting the allegations in the flyer. When an employee asked Miner why she was shaking and was so visibly upset, she responded that she just needed to hit something.

C. Urzua and Palafox Layoffs

In late April, Respondent's Executive Director William O'Connell learned that the Respondent would have a shortfall in the funds it received from the state for the upcoming fiscal year, which was to begin on July 1. He informed Ruben Guajardo, the Respondent's human re-

¹ We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL-CIO effective July 25, 2005.

² During the events at issue here, Jean Miner was serving as the interim director of the center-based program, having previously retired from the executive director position.

³ All subsequent dates are in 2004 unless noted.

sources director, that he had to cut \$130,000 from the budget. Guajardo met with union organizer Sergio Sanchez and Segobia, the shop steward, on May 5, to notify the Union of the coming shortfall and to begin discussions about cost reductions. At O'Connell's direction, Guajardo began developing his own cost-reduction plans. He began considering the savings that he could derive from merging the provider-contract and payout departments. Guajardo decided that he could eliminate three positions if he merged the departments. He met with the supervisors of the departments to discuss the possible merger. He told them he would concentrate the layoffs in the provider-contract department. On May 24, the Respondent's board approved the merger and layoff plan. However, O'Connell and Guajardo held off implementing Guajardo's plan.

Guajardo met with Sanchez several times during May and June to discuss the budget shortfall. On June 28, Guajardo informed Sanchez that the Respondent was planning on merging the provider-contract and payout departments and laying off Urzua, Palafox, and the least senior member of the payout department. When Sanchez raised the collective-bargaining agreement's requirement that the Respondent use seniority in determining layoffs, Guajardo invoked the agreement's exception for layoffs based on employees' differing qualifications and explained that Segobia was more qualified than Urzua and Palafox because she had more experience in both the provider-contract and payout departments.

On June 29, Guajardo met with Palafox and Segobia to discuss the layoffs. Guajardo explained that the Respondent considered Segobia the most qualified of the provider-contract department employees to work in the newly merged department because of her recent experience in the payout department. On June 30, Guajardo met with Sanchez and Segobia to discuss the Union's cost reduction plan. Later that day, the Respondent laid off Urzua, Palafox, and the junior payout employee.

II. JUDGE'S DECISION AND EXCEPTIONS

The judge found that Jean Miner's conduct at the April 14 meeting involved violations of Section 8(a)(1). Specifically, he found that Miner's confrontation with Palafox about her authorship of the flyer constituted a coercive interrogation. In addition, he found Miner's reference to employees being lucky to have a job with the Respondent and her need "to hit something," while discussing her feelings about the union flyer, constituted a threat of reprisal for employees' union activities. The judge also found that the Respondent violated Section 8(a)(3) and (1) by selecting employees Urzua and Palafox for layoff because of their support for the Union.

The Respondent excepts to the judge's findings. First, the Respondent asserts that Miner's confrontation with Palafox at the April 14 meeting did not constitute an interrogation and that Miner's statements at that meeting did not constitute threats. Second, the Respondent disputes that the General Counsel carried his burden of establishing a prima facie case of discrimination. In addition, the Respondent argues that it established that it had a legitimate, nondiscriminatory reason for choosing Urzua and Palafox for layoff and therefore should not be found to have violated Section 8(a)(3) and (1).

III. ANALYSIS

A. The 8(a)(1) Violations

For the reasons stated by the judge, we find that Miner coercively interrogated Palafox at the April 14 meeting, in violation of Section 8(a)(1). However, contrary to the judge, we do not find that Jean Miner's statements to the assembled employees at the April 14 meeting constituted unlawful threats of reprisal for the employees' union activities. No party disputes that Miner was extremely upset with employees when she went before them. We do not believe, however, that her expression of displeasure crossed the line to threats of reprisal. In remarking upon the employees' lack of education and telling them that they were lucky to have their jobs with the Respondent, Miner was expressing her opinion that, given the employees' skill levels and the job market, these employees were fortunate to have their jobs. Miner did not say, or even imply, that these jobs would come to an end. Cf. Mid-East Consolidation Warehouse, 247 NLRB 552, 553 (1980) (employees told they were lucky to have their jobs and that "if they didn't like what they were receiving, they could leave"; violation found solely for the latter statement).4

Our dissenting colleague mischaracterizes our finding by asserting that we require an explicit threat in order to establish a violation of Sec.

⁴ Our dissenting colleague's reliance on Devon Gables Lodge & Apartments, 237 NLRB 775 (1978), and Saunders Leasing, 204 NLRB 448 (1973), is unavailing. In both cases, the Board found an unlawful threat because the employers there linked their comments that employees were lucky to have their jobs to an expectation about employees' future behavior. For example, in Devon Gables, the employer's statement that a nurse was lucky to have her job was coercive when the employer also instructed the nurse to vote against the union if she valued her job. Similarly, in Smithers Tire, 308 NLRB 72 (1992), cited by our colleague, the Board found an objectionable threat in a union agent's statement to an employee with a black eye that "[t]his is what happens when you cross us." The Board found that the remark would reasonably be understood to mean that employees who crossed the union would sustain black eyes. Here, Miner did not establish a condition for employees' continued employment. Further, there was no suggestion that their "luck" would run out because of union activity. Accordingly, there is no reason for the Board to find an implied threat.

Similarly, we do not agree with the judge that employees would reasonably construe Miner's reference to needing to hit something as a threat of reprisal. To draw the inference that employees would believe that Miner literally intended to hit them is unwarranted. Rather, Miner was responding to a question about her mental state, and was conveying her extreme mental anguish. In short, the record does not establish that Miner threatened to take reprisals against the employees. Accordingly, we dismiss this allegation.

B. The 8(a)(3) Violations

We find merit in the Respondent's exceptions to the judge's finding that Urzua and Palafox's layoffs violated Section 8(a)(3) and (1). The parties do not dispute that the Respondent's need to cut costs was genuine. Nor do they deny that the Respondent's decisions to merge two of its departments and to have the resultant layoffs were necessary for legitimate business reasons. Thus, the only question before us is whether the Respondent's selection of Urzua and Palafox as two of the three employees to be laid off was motivated by union animus.⁵

Contrary to the judge, we find that the General Counsel failed to establish that the Respondent was unlawfully motivated in selecting Urzua and Palafox for layoff. Instead, we find that the record supports the Respondent's claim that it chose Urzua and Palafox based on nondiscriminatory selection criteria. The Respondent sought to minimize training costs and disruption to the administration of the grant program. Clearly, in light of the budget cuts that necessitated the layoffs, Respondent's desire to minimize training costs was legitimate. In addition, the parties do not dispute that the Respondent had only 2 weeks after the layoffs to effectuate the merger and process the July payout. Thus, the Respondent's focus on minimizing impact on the payout function was reasonable.

The record shows that the Respondent's conduct in choosing Urzua and Palafox served those goals. When Guajardo first notified the Union about the identity of the employees slated for layoff, he justified their selection by reference to their qualifications. Moreover, the Respondent chose for retention the employee, Segobia, whom the parties do not dispute had the most recent experience in both departments. Finally, by concentrating the layoffs in the provider-contract department, the Respondent reasonably predicted that it would minimize its difficulty in accomplishing the July payout in a timely fashion.

Moreover, we find that the evidence upon which our dissenting colleague and the judge relied fails to support a finding of union animus. First, the judge improperly relied upon a letter that Miner circulated in 2002. Although the letter expresses Miner's great antipathy towards the Union, it does not shed light on the Respondent's motive for its much-later discharge of Urzua and Palafox. Miner wrote the letter 2 years before the decision to lay off Urzua and Palafox. More importantly, despite the dissent's conjecture to the contrary, the record fails to show that Miner had any role in the selection of Urzua and Palafox for layoff. At the time of the layoffs, Miner's authority was limited to the center-based unit. The General Counsel provided no evidence to link Miner to the layoff selection decision. Our dissenting colleague relies on her speculation about Miner's continuing influence. She points to no record evidence that Miner was even consulted about the selection of Urzua and Palafox for layoff.⁶ Therefore, we find it unreasonable to attribute Miner's long-past expression of opinion concerning the Union to those of Respondent's officials who made the layoff decision. Similarly, because Miner was not involved in the selection of Urzua and Palafox for layoff, her interrogation of Palafox does not support a finding of animus in regard to her selection for layoff.

Nor do we find animus in other statements on which the judge relied. The judge found evidence of union animus in comments made by O'Connell and Guajardo around the time of the layoffs. The judge found that O'Connell, on the day of the layoff, made an apparent reference to a union rally held in April. O'Connell told union organizer Sanchez that if Sanchez were so dedicated to negotiating about cost-cutting measures, he would have been calling O'Connell instead of protesting at the rally with a bullhorn. The judge also found that O'Connell told Sanchez that the Union had ruined the Respondent's reputation. Finally, the judge found union animus in Guajardo's cryptic reference to "retaliation" when he informed Urzua of her layoff. The judge found that in response to Urzua's request for an explanation of her layoff, Guajardo said that "the staff talked," and he mumbled something about "retaliation."

We do not believe that these statements establish that the Respondent's layoff selections were motivated by union animus. The General Counsel has not alleged that

⁸⁽a)(1). We do not. We find only that the evidence in this case does not demonstrate an unlawful threat, either implicit or explicit.

⁵ There is no allegation that the layoff of the third employee violated the Act

⁶ Our dissenting colleague presumes, without record support, that Miner participated in the board's decision concerning the layoffs, which was made at its May 24 meeting. The record shows no such participation. Moreover, the record does not show that the board members discussed the selection of Urzua and Palafox particularly for layoff, or even the need for layoffs generally, but shows instead, as the Guajardo.

any of these statements constitute unlawful threats. Indeed, our colleague acknowledges that Miner was expressing her "views regarding the Union" and her "feelings about the Union." Section 8(c) provides that such views and opinions are not unlawful and are not "evidence of unlawful conduct under any of the provisions of this Act." Although there is some extant Board law which uses such expressions of views to support an 8(a)(3) allegation, we are clearly not required to take that approach, and we decline to do so here. Further, the statements are all ambiguous, especially Guajardo's statement to Urzua at the time of her layoff. They do not express unequivocal or even strong opposition to the Union. Moreover, we find nothing in the statements that suggests that the Respondent would be motivated to take unlawful action.

Our colleague appears to link the decision to conduct a layoff to the union activity of holding a rally. However, even the General Counsel does not allege that the layoff decision itself was unlawful. The April 15 rally was called to protest perceived inconsistencies in administering rates for providers and the failure to give employees a raise. Concededly, O'Connell referred to the rally on the day of the layoff. However, at most, O'Connell's suggestion was that the foregoing matters should have been negotiated rather than becoming the subject of a rally. That does not establish that the layoff was causally related to the rally. To the contrary, the layoff was caused by a budget shortfall that was forecasted in late April and was explained to the Union on May 5. Thus, unlike our colleague, we find that O'Connell's statement to Sanchez neither implies a causal connection between the rally and the layoff nor reveals animus on the part of O'Connell.

Finally, the judge further supports his conclusion that the Respondent had an unlawful motivation for the layoffs by finding pretextual the Respondent's proffered explanation for selecting Urzua and Palafox for layoff. Specifically, he found that neither evidence nor logic supports the Respondent's claim that it was necessary to retain more payout department employees in order to minimize training costs and to ensure that the Respondent would be able to complete the July payout process. The Respondent counters that the evidence demonstrates that its concerns about training and the July payout were genuine. We agree with the Respondent. We emphasize that it is not our objective to determine whether the Respondent's choice of Urzua and Palafox was the correct decision or that the Respondent used the best decision-

making process. The Respondent may make its layoff decision on any basis it chooses, good, bad, or indifferent—as long as it is not an unlawful basis. We express no opinion as to whether the Respondent should have retained Urzua and Palafox or should have been so concerned about retraining costs and accomplishing the July payout. The wisdom of the Respondent's decision is immaterial. We are concerned only with discerning the sincerity of the Respondent's contention that the decision was not motivated by union animus.

As discussed above, we do not find the Respondent's proffered justification for its choice of Urzua and Palafox to be pretextual. Indeed, we find nothing inconsistent between the choice of Urzua and Palafox for layoff and the Respondent's stated goals. The judge found that if the Respondent were sincere in its desire to minimize training and facilitate the July payout, it would have retained Urzua because of her long experience in both the provider-contract and payout departments. The record shows, however, that Urzua had not performed payout department duties for a number of years. Segobia, in contrast, had much more recent payout department experience, having transferred from that department into the provider-contract department just over a year prior to the merger.

Thus, we cannot conclude that the Respondent was unlawfully motivated in determining that it could minimize its training costs by retaining only Segobia from the provider-contract department. If it had chosen two employees from the payout department for layoff and, instead, retained both Segobia and Urzua, the Respondent's training costs likely would have been higher. Whether it retained all payout employees but one or all but two, the Respondent still would have had to conduct department-wide training for payout employees in how to perform provider-contract department duties. If it retained only Segobia from the provider-contract department, however, the Respondent's training in payout duties would have been minimal, in light of Segobia's recent payout experience. In contrast, if the Respondent retained both Segobia and Urzua, it would have had to provide both extensive provider-contract training for the payout department employees, and extensive payout training for Urzua. Accordingly, retention of Urzua in place of another junior payout department employee would have increased the Respondent's training costs.

Our dissenting colleague concedes that these statements are ambiguous, but still argues that we should infer that they demonstrate "significant" animus. We decline to make that leap.

⁸ Palafox had no exceptions in the payout department.

⁹ The Respondent's calculus is further supported by Supervisor Alderete's testimony that it would be easier to train payout employees to do provider-contract work than to train provider-contract employees to do payout work.

We also find unpersuasive the judge's reliance on the Respondent's failure to investigate the payout and provider-contract employees' relative qualifications prior to making its layoff selections. In light of its stated goals, the Respondent clearly valued very highly recent experience in payout department duties. No investigation was necessary to determine employees' relative payout experience. ¹⁰

Our dissenting colleague's assertion that the Respondent ignored Urzua's and Palafox's qualifications is based on her own definition of the relevant qualifications. We do not dispute that Urzua and Palafox were good employees. The Respondent, however, in making difficult budgetary decisions, chose to value more highly skills that they did not possess, such as recent payout department experience. As discussed above, our role is not to assess whether the Respondent made a good decision to let go well-performing employees. By the Respondent's definition of the qualifications it needed, Urzua and Palafox were less qualified. We find no basis in the record for concluding, as our colleague does, that the measure of qualifications applied by the Respondent was artificial and designed to yield results desired by the Respondent. We find that the Respondent's definition was not so unreasonable as to establish pretext.

We reject our dissenting colleague's assertion that a finding of pretext is compelled by the chronology of the Respondent's decisionmaking process. Again, the dissent speculates as to the Respondent's motivation without record support. The uncontradicted testimony shows that the Respondent developed its layoff plan at the same time it was negotiating with the Union over the impact of the budget cuts, not because of bad faith, but because of the imperative that it have a cost-cutting plan in place by July 1. The July 1 deadline was externally imposed. If the negotiations with the Union were not concluded by July 1, the Respondent had to have a comprehensive means of cutting the budget in place. Accordingly, the Respondent followed the prudent path of engaging in parallel processes. We note that there is no allegation before us that the Respondent violated Section 8(a)(5) by implementing its layoff plan or by acting in bad faith in dealing with the Union about it.

Finally, we also note that Segobia, the steward and most prominent union activist, was not laid off, and a third employee, not shown to be a union activist, was laid off.

Accordingly, we find that the record does not support a finding that union animus motivated the Respondent's selection of Urzua and Palafox for layoff. Therefore, we dismiss the allegations that the Respondent violated Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Children's Services International, Inc., Salinas, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

- 1. Cease and desist from
- (a) Unlawfully interrogating employees about their union activities.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its Salinas, California facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since April 14, 2004.
- (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, Washington, D.C. May 22, 2006

Robert J. Battista, Chairman

The Respondent's decision to retain at least one provider-contract department employee is not inconsistent with its valuing of recent payout department experience. It was reasonable for the Respondent not to want to lose all institutional knowledge of the provider-contract department duties.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Contrary to the majority, I would adopt the judge's reasonable and well-founded conclusions that: (1) Jean Miner unlawfully threatened the Respondent's employees with the loss of their jobs in reprisal for their union activities; and (2) employees Aurora Urzua and Griselda Palafox were unlawfully selected for layoff because of their union activities.¹

I. MINER'S THREAT

On April 14, 2004,² Jean Miner held a mandatory meeting with the Respondent's administrative employees, to respond to a union flyer that she perceived as a personal attack. At the start of that meeting, Miner angrily confronted employee Palafox and unlawfully interrogated her about her involvement in creating the flyer. Afterward, Miner was so upset that she was visibly shaking, and she told an employee that she "just needed to hit something." It was in this context of anger and frustration—emotions generated directly by the employees' union activities—that Miner told the employees that she had looked through their personnel files, that she knew they were uneducated, and that she believed that working for the Respondent was the best job they were ever going to have and that they were lucky to have those jobs.³

In view of Miner's obvious fury about the union flyer and her angry verbal confrontation of an employee she perceived as being involved in making the flyer, a reasonable employee could—and likely would—have understood Miner's statements as warnings that, by engaging in union activity, they risked having to look for other, likely inferior, employment. See *Devon Gables Lodge & Apartments*, 237 NLRB 775, 784 (1978) (finding unlawful threat of discharge based on union support where supervisor told nurses aide that nurses aides were unskilled workers, that anyone could perform their work, that they were lucky to have their jobs, and that if she valued her job, she would vote against the union); see

also *Saunders Leasing System*, 204 NLRB 448, 452–453 (1973) ("clear implication" of supervisor's statement that employee was lucky to have a job with employer was that, if employee testified unfavorably to employer in Board hearing, employer would be less tolerant of employee's misconduct than in the past).⁴

In finding that Miner's April 14 statements did not constitute threats of reprisal, the majority concludes that her remarks did not cross the line to threats of reprisal because Miner did not say or imply that the employees' jobs would come to an end. But the Board's test for whether a statement constitutes an unlawful threat depends not only on the words of the speaker, but also on the reasonable inferences that an employee can draw from the statements, in view of the circumstances.⁵ In the circumstances here, including Miner's obvious anger, the explicit threat the majority finds lacking was simply unnecessary.

II. URZUA AND PALAFOX'S LAYOFFS

Contrary to the majority, I would also adopt the judge's conclusion that the Respondent unlawfully selected Aurora Urzua and Griselda Palafox for layoff, based on their union activities. The Respondent's antiunion animus was amply demonstrated, and the Respondent's asserted reasons for choosing Urzua and Palafox

¹ I join the majority in finding that Jean Miner unlawfully interrogated employee Griselda Palafox regarding her participation in the creation of a flyer that was critical of Miner. I also join the majority in finding that Miner's statement that she "just needed to hit something" did not constitute an unlawful threat of reprisal against the employees, because a reasonable employee would not conclude that Miner, by this statement, was threatening a physical assault.

² All dates are in 2004 unless otherwise indicated.

³ The Respondent characterizes Miner's comments as compliments to the employees for recognizing the importance of education and the value of the Respondent's work. Given the context in which Miner's statements were made, that positive spin is implausible.

⁴ See also *Mid-East Consolidation Warehouse*, 247 NLRB 552 (1980). The majority's effort to distinguish that case is unavailing. The Board there addressed the employer's statements that the employees were lucky to have their jobs and that employees who did not like their wages should leave. Contrary to the majority's suggestion, the Board neither stated nor implied that the latter statement was essential to its finding that the employer unlawfully threatened reprisal. Rather, the latter statement provided context supporting the employees' reasonable perceptions that the statements were threats. The timing and context of Miner's statements in this case support a similar conclusion.

The majority also fails to persuasively distinguish *Devon Gables* and *Saunders Leasing*, supra. Contrary to the majority's suggestion, a threat, whether express or implied, need not be linked to a stated expectation about employees' future behavior. The speaker's opposition to particular conduct communicates clearly, if implicitly, what behavior the speaker seeks from the threatened individual. See, e.g., *Smithers Tire*, 308 NLRB 72 (1992). There, the Board found an unlawful threat in the statement, "This is what happens when you cross us." Despite the absence of any express linkage to future behavior, a reasonable employee would surely understand the implied corollary message, "Don't cross us again." Similarly, here, in the context of Miner's unmistakable anger at employees' union activities, reasonable employees could understand the implication that their continued "luck" in employment depended on ceasing their involvement in union activities.

⁵ See, e.g., *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995) (threats "need not be explicit if the language used by the employer or his representative can reasonably b[e] construed as threatening.").

are pretextual, ⁶ thus supporting a finding that the layoff selections were based on an unlawful reason. ⁷

A. Antiunion Animus

The majority finds that the evidence of antiunion animus presented by the General Counsel is stale and unrelated to the layoff selections. I disagree, and I would find the evidence of animus by Jean Miner and other managers sufficient to meet the General Counsel's initial burden under *Wright Line*.

First, Jean Miner's antiunion animus cannot be doubted. In a letter distributed in 2002, just after the employees voted for union representation, Miner referred to union supporters as a "gang . . . driven by mob mentality" and accused them of "alcoholism, domestic violence, limited education, social isolation, emotional disability, and a value system that does not recognize the boundaries of law nor the rights of others." She described union supporters as "instigators not feeling bound by truth," "malcontents who use their talents to create chaos," and "members of the new 'blackguard." Significantly, in this letter Miner also accused "self-serving (more highly compensated but disgruntled office workers)" of "derail[ing] the [Respondent] and . . . depriv[ing] many of the benefits it offered."8 Urzua was the most senior and most highly-paid office worker at the time, and the judge rightly found that Urzua was among the employees Miner's letter referred to.

Although Miner's letter to the employees was 2 years old at the time of the layoffs, the evidence showed that Miner's animus toward the Union had not changed in the intervening time. Indeed, in her hearing testimony, Miner essentially reaffirmed her previously-expressed views regarding the Union, stating that she remained angry about the union supporters' conduct, including posting union flyers. ¹⁰

Miner's conduct at the April 14 meeting, in turn, demonstrates animus concurrent with the layoffs. As discussed above, I would find that Miner unlawfully threatened the employees with reprisals for their union activity. Nevertheless, as the majority acknowledges, we can find that these statements demonstrate animus, even without finding them independently coercive. The majority errs in choosing not to do so, given the undisputed fact that Miner's harsh and angry statements were prompted by the employees' union activities. ¹¹

Although the majority contends that Miner was uninvolved in the layoff decision, this is not clear: Miner attended the board of directors meeting at which the layoff decision was approved. ¹² The majority's assumption that Miner's own animus did not infect the decision-making process is implausible. ¹³

Second, the evidence demonstrated the animus of individuals more openly involved in the layoff decisions than Miner. Timothy O'Connell—Miner's son-in-law, the Respondent's executive director, and a primary decision-maker in the layoffs—told Union Representative Sergio Sanchez, on the day of the layoffs, that, if Sanchez was so willing to negotiate about how to respond to the budget shortfall, he should have been calling O'Connell, rather than protesting with a bullhorn (at the union rally

⁶ There is no claim that the simultaneous layoff of Angie Amador, the most junior member of the payout department, was unlawful.

⁷ See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel meets his or her initial evidentiary burden by establishing that: (1) the employee engaged in protected activity; (2) the employer knew of that activity; and (3) the employer demonstrated animus toward that activity. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer "to demonstrate that that same action would have taken place even in the absence of the protected conduct." See *Webasto Sunroofs, Inc.*, 342 NLRB No. 124, slip op. at 3–4 (2004). There is no dispute that Urzua and Palafox engaged in union activities and that the Respondent was aware of those activities.

⁸ In her letter, Miner also predicted that "[u]nder the influence of people who lead by yelling through a bullhorn, marching in the street, keying cars, threatening others, making false accusations, creating a media circus, and preaching hate rather than engaging in cooperative problem solving, the [Respondent] will ultimately fail." She accused the Union and its supporters of "utiliz[ing] many of the same tactics" as "[t]he Red Guards of communist China and the USSR." In addition, Miner opened her letter by defining "worker" as "a person, animal, or thing that works . . . or any of a class of sterile or sexually imperfect female ants, bees, etc. . . "and stated that she "had hoped [the employees] would opt to be 'administrators' or 'teachers,' [rather than 'workers,'] but . . . your choice."

⁹ Moreover, Miner testified that she hand delivered the letter to the individuals she was referring to. Urzua testified that Miner threw the letter at her.

¹⁰ The majority contends that Miner's "views and opinions" about the Union are protected by Sec. 8(c). However, Miner's statements are unmistakable evidence of antiunion animus, and should be recognized as such.

¹¹ Even accepting the majority's choice not to find evidence of animus in statements that do not violate Sec. 8(a)(1), the majority should find animus based on Miner's unlawful interrogation of Palafox, during that same meeting, regarding Palafox's creation of the union flyer.

¹² Before she was shown the minutes reflecting her attendance at this meeting, Miner claimed that she had "no inkling" that the Respondent was planning an organizational restructuring and that she found out about it only when it happened. The judge neither credited nor discredited these statements.

¹³ Miner was the Respondent's founder, continued to supervise many of its employees, was the mother-in-law of the executive director, and was able to order employees outside her official supervision to attend a mandatory meeting. Thus, while Miner's formal authority at the relevant times may have been limited to the center-based unit, as the majority finds, her actual power in the Respondent's management clearly extended farther. O'Connell's refusal even to apologize for his motherin-law's April 14 conduct, let alone to sanction her, further demonstrates Miner's continued power in the Respondent's administrative office.

on April 15). By this statement, O'Connell linked the layoffs that he knew were imminent with the Union's protected conduct of holding a rally. Also, O'Connell—apparently referring to the news coverage of the union rally—accused Sanchez and the Union of ruining the Respondent's reputation.

Respondent's human resources manager, Ruben Guajardo, also demonstrated antiunion animus. When Urzua asked Guajardo why 80 percent of his salary was allocated to the administrative unit, even though it was only one-fourth the size of the center-based unit, Guajardo responded that there were "problems" in the administrative unit and that it was more "difficult." Guajardo also told Urzua that "people talk" and muttered something about "retaliation" when Urzua asked why she was selected for layoff. When Urzua asked what he meant by "retaliation," Guajardo waved his hand dismissively and did not answer. While Guajardo's comments may be ambiguous standing alone, in context they support the conclusion that the Respondent's decisionmakers bore significant animus toward the Union and its supporters.

B. Pretext

The majority also errs in reversing the judge's finding that the Respondent's asserted reasons for selecting Urzua and Palafox for layoff were pretextual. Substantially for the reasons stated by the judge, I would adopt his findings that the pretextual nature of the Respondent's rationale was shown by: (1) the Respondent's failure to consult Supervisors Alderete and Diaz regarding the relative qualifications of the various provider-contract and payout employees; (2) its disregard of Palafox's recent and highly positive employee appraisals; and (3) its disregard of Urzua's experience performing (for almost 20 years, some of the time singlehandedly), as well as supervising, the payout employees' work. In sum, the Respondent's definition of the employees' "qualifications" as only their recent experience working in the payout department seems designed simply to justify laying off Urzua and Palafox despite their seniority. 15

Unlike the majority, I am not persuaded by the Respondent's claim that its selection of employees for lay-off was targeted to reduce training costs and to ensure that the July payout was completed on time. Until mid-August, Urzua and Palafox's duties were performed by Supervisors Alderete and Diaz. There is no evidence suggesting that Alderete and Diaz would have been less able to substitute for any other (presumably less experienced) employees the Respondent might have laid off instead of Urzua and Palafox. Moreover, Roxanne Segobia, the only provider-contracts employee who was not laid off, testified that her training to perform payout department work lasted a mere 60-90 minutes, and that Urzua and Palafox could have been trained just as quickly. ¹⁶

In addition, the Respondent's determined effort to prevent the Union from knowing of its plan until after the layoffs had occurred is strong evidence of its unlawful motive. As the judge describes, the Respondent carried out its entire process—deciding to merge the provider-contract and payout departments; consulting with Supervisors Alderete and Diaz about the merger; deciding that Urzua and Palafox, the two most experienced provider-contract employees (and Amador, the least experienced payout employee) would be laid off; and obtaining board of directors approval for the plan—while simultaneously pretending to negotiate with the Union about its plans, as if the decisions had not already been made. ¹⁷

Only on June 28 did Guajardo inform Sanchez that the Respondent was "thinking about" merging the departments and undertaking the intended layoffs—layoffs that had been formally approved by the board of directors over a month earlier. When Palafox and Segobia asked Guajardo, on June 29, whether it was true that Urzua and Palafox would be laid off, Guajardo denied that layoffs were imminent. On the afternoon of June 30, when Guajardo and O'Connell met with Sanchez and Segobia (purportedly to discuss the Union's proposal regarding

¹⁴ O'Connell's remark appears to suggest that the Union's protected conduct reduced the chance of saving unit employees' jobs. Contrary to the majority's implication, I do not contend that the Respondent's decision to reduce its costs via layoffs was caused by the employees' rally; I simply note that O'Connell suggested such a causal connection, which implicates his own antiunion animus. At the time of the rally, the Respondent had not yet notified the Union even that it anticipated a budget shortfall, let alone that there would be layoffs; O'Connell could not seriously have expected Sanchez to negotiate about a problem of which he had not been informed.

¹⁵ I do not, as the majority contends, apply my own definition of the relevant qualifications; I merely agree with the judge that the Respondent's definition was structured narrowly and artificially to justify the result sought. Thus, contrary to the majority, I do find that the Respondent's definition is so unreasonable as to establish pretext.

¹⁶ I agree with the judge that the Respondent's retention of Segobia, despite her union activity, does not counter other evidence of the Respondent's unlawful motive in laying off Urzua and Palafox. A Respondent need not discriminate against all prounion employees in order for the Board to find that it discriminated against some. See, e.g., *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987).

¹⁷ The majority contends that I "speculate[] as to the Respondent's motive without record support." As *Wright Line* recognizes, direct evidence of the employer's unlawful motive is rarely available, and our analysis usually depends on reasonable inferences drawn from circumstantial evidence. Id., 251 NLRB 1083, 1083–1084 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I find ample evidence of the Respondent's bad faith—and thus its unlawful motivation—not, as the majority implies, in its efforts to comply with the externally-imposed July 1 cost-cutting deadline, but in its deliberate concealment of its plans from the Union until the last possible moment.

the budget shortfall), Guajardo and O'Connell still did not notify the Union that the merger-and-layoff plan would be implemented. O'Connell even stated at the close of that meeting that he would consider the Union's plan. The layoffs, however, were carried out later that same afternoon, without notice to the Union that a decision had been reached.¹⁸

III. CONCLUSION

The majority's conclusion that the facts of this case, as found by the judge, add up to nothing more than a single unlawful interrogation is simply untenable. I would find, as the judge did, that the Respondent violated Section 8(a)(1) when Miner implicitly threatened the administrative unit employees on April 14, and that the Respondent violated Section 8(a)(3) and (1) by selecting Aurora Urzua and Griselda Palafox for layoff because of their union activity.

Dated, Washington, D.C. May 22, 2006

Wilma B. Liebman,

Member

NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully interrogate employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

CHILDREN'S SERVICES INTERNATIONAL, INC.

Amy L. Berbower, Esq., for the General Counsel.

Robert J. Wilger, Esq. and Adam J. Fiss, Esq. (Littler Mendelson), of San Jose, California, for the Respondent.

Antonio Ruiz, Esq. (Weinberg, Roger & Rosenfeld), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on January 11 through January 14, 2005. On July 9, 2004, Service Employees International Union, Local 817, AFL–CIO (the Union) filed the original charge alleging that Children's Services International, Inc. (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Union filed the first amended charge on August 11, 2004. On September 28, 2004, the Union filed its second amended charge. On October 28, 2004, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

The Employer is a California nonprofit corporation with facilities in Gonzalez, Greenfield, Marina, Salinas, and Pajaro, California, engaged in providing childcare and educational services. During the 12 months prior to issuance of the complaint, the Employer, in the course and conduct of its business, received gross revenues in excess of \$250,000 and directly received revenues in excess of \$100,000 from outside the State of California. Accordingly, Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits and I find that at all times material herein Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

¹⁸ The laid-off employees were provided with final paychecks that afternoon. Such paychecks generally must be prepared in advance, a fact that further indicates that the Respondent never intended to consider the Union's proposal or to be swayed from its settled plan to lay off Urzua, Palafox, and Amador.

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background and issues

Respondent and the Union are parties to a collective-bargaining agreement, effective by its terms from October 1, 2002 to September 30, 2004. The agreement covers two units of the Employer's employees; the center-base unit and the administrative unit. The agreement includes a union-security clause requiring unit employees, after a lawful grace period, to become and remain members of the Union.

On November 14, 2003, a child care center-based employee filed a petition in Case 32–UD–207 seeking to withdraw the authority of Respondent and the Union to enforce the union-security clause. On April 1, 2004, an election was held under the supervision of the Regional Director of Region 32. On April 12, 2004, the Regional Director issued a certification of results of election certifying that a majority of the eligible employees did not vote to withdraw the authority of the Union and Employer to enforce the lawful union-security clause. On May 28, 2004, I issued a decision in Case 32–CB–5713–1 finding that the Union had violated Section 8(b)(1)(A) of the Act by announcing and making monetary payments to employees in order to restrain and coerce employees during the pendency of a deauthorization petition in Case 32–UD–207. In the absence of exceptions, the Board adopted my decision.

On June 30, 2004, Respondent, faced with budget cuts, merged two of its administrative departments, its providercontracts department and its provider-payout department, and laid off three employees. Although the General Counsel does not contest Respondent's decision to merge departments or to layoff employees, General Counsel alleges that Respondent selected senior and experienced employees, Aurora Urzua and Griselda Palafox, for layoff because of their union and/or protected concerted activities. The General Counsel contends that Respondent selected Palafox and Urzua for layoff by "evaluating" their qualifications under such artificially limited criteria that it was clearly predetermined that Urzua and Palafox would be laid off. Moreover, the evidence shows that the work that they performed for 23 and 6 years respectively was assigned to less senior and untrained employees following the layoff. Respondent contends that it choose these employees for lay off based on qualifications.

2. The administrative unit

The "administrative unit," the unit at issue herein, encompasses four departments: the provider-contracts department, the eligibility department, the provider-payout department, and the finance department. The provider-contract department employed three provider-contract specialist (PCS) employees, Aurora Urzua, Griselda Palafox, and Roxanne Segobia. These PCS employees were responsible for registering independent childcare providers into Respondent's alternative payment pro-

gram and negotiating contracts under which the providers would be reimbursed for the care of children in eligible families. The payout department employed approximately seven payout-specialist employees who were responsible for calculating and processing monthly payments to the independent childcare providers. The eligibility department employed approximately 10 eligibility specialists who were responsible for enrolling low-income families eligible for subsidized childcare into Respondent's program. The finance department includes a financial and information-systems specialist and an accounts-receivable specialist. The unit also includes one receptionist. Prior to the June 30, layoffs at issue herein, Sylvia Alderete supervised the PCS and eligibility employees and Pat Diaz supervised the payout employees.

The PCS employees were responsible for enrolling new providers to the alternative payment program. They also maintained the provider files for Respondent's more than 600 different providers enrolled in the program, including licensed daycare providers, exempt providers, private center programs, schools, and churches. PCS employees executed contracts with the providers on behalf of Respondent and established separate rate sheets for each provider, which included different rates according to a child's age, special needs, premiums for after hours and weekend care, and a parent contribution schedule, in certain circumstances. When executing provider-contracts, PCS employees were responsible for explaining to the providers all the rules, regulations and procedures (maintained by Respondent and the State of California) that apply to the alternative-provider program, and must obtain the mandated documentation for the provider files.³ PCS employees also explained Respondent's payment process and instructed providers how to fill out and calculate timesheets for reimbursement. PCS employees assisted providers after the initial enrollment by executing new contracts when rates changed, updated provider information, verified provider income to outside agencies, and responded to provider inquiries about rates, regulations, and payment problems.

Prior to the instant layoffs, Respondent's payout department processed the provider payments for care provided to eligible families under the alternative-provider program. Each month, the payout employees mailed blank timesheets to the providers. The providers completed the timesheets and submitted them for payment during the first 3 days of each month. The payout employees reviewed the completed timesheets, verified the rates claimed by the provider, manually calculated payment due using a ten key calculator and attached the 10-key tape to the timesheet to verify the calculation for auditing purposes. The calculated amounts were then entered into Respondent's

² As mentioned earlier, Respondent operates various childcare centers. The employees at those childcare centers are represented by the Union in a separate unit. There are approximately 100 employees in the center-based unit.

³ The State regulations regarding payment for the independent child-care providers often changed. When there were changes in the State regulations, Respondent's alternative-provider program employees were required to make changes accordingly. Urzua and the supervisors attended training sessions in order to learn about the changes in the State regulations. Urzua and the supervisors would in turn advise the employees in the provider-contracts and payout departments about these changes.

NOHO software program. The calculated and verified timesheets were forwarded to the financial department, which prints the providers' checks that are due the 15th of each month. After payment is mailed out each month, payout employees process late timecards and complete an in-house report, which is used to doublecheck the payment calculations. The PCS employees routinely assisted payout employees during the processing of provider payout to determine rates and calculate provider payment. PCS employees also regularly assisted payout processing of payment to rectify over and under payments reported by providers. Prior to the layoffs, the PCS employees kept the provider-contracts and files. This required the payout employees to go to the PCS offices to check provider-contracts and files. This process was not efficient and was improved by the merger of the two departments at the end of June 2004.

At the time of the June 30 layoffs, Urzua was Respondent's most senior employee and had been working in the alternativeprovider program for over 23 years. Prior to 1999, Urzua supervised all facets of the alternative-provider program. In 1999, Timothy O'Connell, then Respondent's executive director, divided the program into the provider-contracts, payout, and eligibility departments. Prior to this change Urzua was responsible for all aspects of the alternative provider program including enrolling providers, enrolling eligible families, and processing payouts to providers. After the change in 1999, Urzua continued to supervise the senior provider-contract employees until Diaz was promoted to supervise the department. During her employment with Respondent, Urzua trained many alternative provider program employees, including current Supervisors Diaz and Alderete, and both PCS employees Palafox and Roxanne Segobia.

Palafox worked for Respondent as a PCS employee since March 1999. She was the fourth most senior employee in the administrative unit. Palafox' last appraisal praised her knowledge of work procedure and regulations and the quality and quantity of her work. Palafox was senior to Segobia, the third PCS employee.

Segobia began working for Respondent in September 2001 as a payout specialist. In March 2003, Segobia became a provider-contract specialist. After the layoffs of June 30, Segobia worked in the payout department performing provider-contract and payout work.

Urzua, Palafox, and Segobia were all known union activists. Urzua was one of four employees on the Union's initial organizing committee. Palafox served as a union observer during the representation election in 2002. Both Urzua and Palafox were members of the Union's negotiation committee and represented the administrative employees in negotiations for the collective-bargaining agreement. Urzua and Palafox were among the union representatives who executed the bargaining agreement on behalf of the Union.

After the bargaining agreement became effective, Urzua and Palafox negotiated with Respondent's management concerning

various issues. Both employees also brought issues before the public meetings of Respondent's board of directors.

In March 2004, Segobia became the Union's shop steward for the administrative unit. Even after Segobia became steward, Urzua and Palafox continued to assist employees with personnel and contract issues. Urzua attended two meetings with management in June 2004, to discuss Respondent's budgetary problems. During a meeting on June 8, 2004, Urzua questioned Ruben Guajardo, Respondent's human resources manager, regarding the allocation of 80 percent of his salary to the administrative unit. Urzua pointed out that the center-based unit had approximately 100 employees and the administrative unit had only 23 employees. Guajardo replied that there were "problems" in the administrative unit and that unit was more "difficult."

3. Jean Miner's meeting with the administrative unit

After the filing of the deauthorization petition on November 14, 2003, the Union campaigned heavily to defeat the petition. The Union's campaign included at least one flyer, which was extremely critical of Jean Miner, Respondent's founder, and then interim director of center-based programs.

On April 14, Jean Miner held a meeting with Respondent's administrative employees to address her concerns with a union flyer. The flyer complained that Respondent had not granted the center-based employees an expected \$.25-per-hour wage increase. The flyer contained a picture of Miner's car and home and contended that Respondent could have paid the employees the raise but for Miner's alleged greed.

Although Respondent claims that Miner had no authority over the administrative employees, she required all administrative employees to attend the meeting during worktime. Palafox was busy with a client and Miner delayed the meeting until Palafox could attend. Miner started the meeting by stating that it would be a brief meeting because only she would be speaking. Miner passed out the union flyer stating that the flyer was what the employees were paying the Union for. When Miner attempted to give Palafox a copy of the flyer, Palafox said that she had already seen it. Miner replied "of course you did because you created it." Palafox answered that she had not and that Miner should talk to the Union. Miner then responded, "You pay the Union."

Miner told the employees that she had gone through their personnel files and that the employees were uneducated. Miner said the employees had the best jobs that they ever had and were lucky to have their jobs. Segobia asked Miner if the meeting was related to her work and if she could be excused. Miner told Segobia that she could be excused. As Segobia left the meeting, Urzua and Palafox went with her. As the three employees were leaving, Miner declared, "There go your leaders." Miner also said, "I'll see you tomorrow at the rally." Miner then explained to the employees that her car and house were already paid for and that she was volunteering for Respondent

⁴ Respondent intends to utilize the NOHO software program to calculate payouts to providers. However, at the times relevant herein, Respondent's employees were still calculating the payouts with a 10-key calculator.

⁵ Although the deauthorization petition and campaign concerned the center-based unit, Miner did not hold any meetings with the center-based employees to complain about the union's flyer.

⁶ The Union had planned a rally at Respondent's offices to be held the next day.

until a permanent director could be found. Miner was visibly shaken and an employee questioned her about it. Miner answered that she just "needed to hit something."

This was not the first time that Miner expressed extreme animus against the Union and its adherents. In 2002, Miner distributed a letter in which she referred to union supporters as a gang driven by mob mentality. She accused them of "alcoholism, domestic violence, limited education, social isolation, emotional disability, and a value system that does not recognize the boundaries of law nor the rights of others." She stated inter alia, "It is most unfornuate that the self-serving (more highly compensated but disgruntled office workers) have derailed the organization [Respondent] and will deprive many of the benefits it offered." Urzua was Respondent's most senior and highest paid office worker at that time. It is clear that Urzua was included among the employees that Miner was accusing of "creating chaos." At the hearing, Miner reaffirmed the views expressed in her 2002 letter.

On April 15, the day after Miner's meeting with the administrative unit employees, employee Leticia Caldera filed a grievance complaining about Miner's intimidating and threatening behavior. Seventeen employees, including Urzua, Palafox, and Segobia, signed the grievance. On April 26, Timothy O'Connell, then Respondent's executive director, responded that no apology would be forthcoming and that Miner would leave Respondent's employ at the end of April. Twelve employees, including Palafox, responded in writing that O'Connell's answer was not adequate.

On Thursday, April 15, Urzua and Palafox participated in a union rally after work in which providers and employees rallied to protest what they perceived as Respondent's inconsistent application of provider rates and the failure of Respondent to grant wage increases to the center-based employees. The next day, a local newspaper carried a story about the rally and published a picture that showed Palafox carrying a picket sign stating "Management Must Resign Now." Urzua's husband was also shown in the newspaper photograph holding a sign, which read "Jean Miner The Intimidator Must Go." A local television station also videotaped the rally. The videotape, which was aired often on local public television, included an interview with Palafox in which she criticized Respondent and Jean Miner.

4. The layoffs of Urzua and Palafox

On May 5, O'Connell and Guajardo met with Union organizer Sergio Sanchez and Segobia to discuss Respondent's anticipated budget shortfall. During the meeting, Guajardo notified the Union of Respondent's expected budgetary shortfall and asked the Union to "start thinking" about cost reductions in the administrative unit. At this meeting, there was no discussion of layoffs.

Thereafter, O'Connell and Guajardo began considering plans

to cut \$130,000 from the administrative budget. They focused on merging the provider-contract department and the payout department with the resultant layoff of three employees. The merger of these two departments seemed logical because they had previously been combined. In fact, Urzua had suggested such a merger in a Union-Respondent meeting. According to Guajardo he spoke with Supervisors Alderete and Diaz, the supervisors of the two departments involved. The supervisors were in favor of such a merger because both departments dealt with providers, used the same provider information and the merger would reduce the ratio of providers to employees. While there was some discussion concerning the experience of the PCS employees, there was no discussion of the qualifications of the payout employees. The supervisors were not questioned as to the abilities of the employees in their departments or whom they would choose for layoff. 10

Following his meeting with Supervisors Alderete and Diaz, Guajardo met with O'Connell to finalize the decision to merge the provider-contract and payout departments. Guajardo and O'Connell agreed that the merger of these two departments was a logical cost-saving strategy because the PCS and payout employees both worked with the independent childcare providers and the departments had previously been incorporated in a single department. On or about May 24, O'Connell directed Guajardo to draft a memorandum setting forth the plan to merge the department and to layoff three employees (two PCS employees and one payout employee) to present to Respondent's board of directors. O'Connell presented the memo to the board of directors at a meeting held the evening of May 24. The board of directors approved the plan as set forth in the memorandum without discussion.

Between May 24 and June 28, Guajardo discussed with the Union Respondent's need to cut \$130,000 from its administrative budget. However, it was not until June 28, that Guajardo informed Sanchez that Respondent "was thinking about" merging the PCS and payout departments and considering employees Urzua, Palafox, and Angie Amador for layoff "based upon their qualifications." Amador was the least senior employee in Respondent's payout department. General Counsel does not challenge the selection of Amador for layoff. Sanchez complained that Respondent was considering laying off senior employees Urzua and Palafox. Guajardo responded that Respondent did not have to follow seniority. Guajardo stated that the bargaining agreement permitted Respondent to layoff based on qualifications and that Respondent "was going by qualifications." The layoff provision of the contract states:

When layoffs or reduction of work are necessary, quality and

⁷ Miner said that she facetiously stated that she needed to hit something. She explained that at the childcare centers, children are told they can release their frustrations by hitting an inanimate object.

⁸ O'Connell is Miner's son-in-law.

 $^{^{9}\,\}mathrm{Miner's}$ contract as interim director of the centers was extended until August 30.

Ouajardo testified, in his direct testimony, that at the time he spoke with Diaz and Alderete he was just seeking information to see if the merger was a good business move and was not yet seriously considering merging the two departments. However, on cross-examination Guajardo testified that he told Diaz that one payout department employee was to be laid off and that employee would be Angie Amador, the least senior employee. Guajardo also testified that he and O'Connell did not consider any payout employee for layoff until after they had decided to retain Segobia. Thus, it appears Guajardo and O'Connell had already decided to retain Segobia and layoff Urzua and Palafox prior to Guajardo's meeting with Diaz and Alderete.

continuity of childcare will be the primary consideration. Among employees who are equally qualified, seniority, as in the length of continuous service with [Respondent] will be the determining factor. . . . Prior to layoff, [Respondent] will give a five (5) calendar days notice to employees.

On June 29, Palafox and Segobia met with Guajardo to discuss reports that Urzua and Palafox were going to be laid off. Palafox questioned why senior employees such as Urzua and herself were going to be laid off. Guajardo stated that Respondent was going by qualifications. Palafox stated that Urzua was the most qualified and most senior employee. Guajardo answered that Segobia had worked in the payout department and, therefore, she was the most qualified of the PCS employees. Palafox responded that Urzua had worked in the administrative unit for over 23 years and had been the only payout employee for many years. Guajardo replied that Segobia's payout experience was more recent and that if the matter went to court, he was confident that Respondent "would win." Palafox and Segobia asked why less senior employees were not being laid off. Guajardo insisted that Respondent could lay off employees based on qualifications. Guajardo stated that no layoffs would be taking place at that time. Guajardo did not indicate that layoffs would take place 2 days later.

On June 30, Guajardo and O'Connell met with Sanchez and Segobia to discuss the Union's proposal regarding the budget shortfall. The parties only discussed a union proposal and there was no mention of Respondent's plan to merge the provider-contract and payout departments with the resultant layoff of three employees. Neither Guajardo nor O'Connell mentioned that layoffs would be made that very day. As the meeting ended, O'Connell stated that he would consider the Union's proposal and Sanchez stated that he would be willing to negotiate every day, if needed. O'Connell stated that if Sanchez was so willing, he would have been calling O'Connell on the telephone rather than protesting with a bullhorn (an apparent reference to the Union's demonstration of April 15). O'Connell accused Sanchez and the Union of ruining Respondent's reputation.

Following the meeting with the Union, O'Connell instructed Guajardo to go forward with the merger of the providercontract and payout departments and to layoff Urzua, Palafox, and Amador. At approximately 5 o'clock that afternoon, Guajardo notified Segobia that Respondent would be laying off Urzua, Palafox, and Amador that day. At 5 p.m., Guajardo met with Amador and provided her with her layoff notice and final checks. Guajardo did not directly notify Urzua and Palafox of their layoffs. Palafox and Urzua learned of their layoffs from Segobia. At approximately 5:30 p.m., Sanchez asked Guajardo why Guajardo had not mentioned the layoffs at their meeting, earlier that afternoon. Guajardo answered that Respondent was moving ahead with its plan to cut costs and that the Union's proposal was going to take too long. Urzua then demanded an explanation as to why she, the most senior employee, had been selected for layoff. Guajardo responded that staff talked and then he mumbled something about retaliation. Urzua questioned what retaliation had to do with her layoff. Guajardo did not answer Urzua and waved his hand in a dismissive manner.

Despite the contract language requiring employees to receive 5-calendar days notice, Palafox and Urzua did not receive such notice. Subsequently, they received paychecks in lieu of notice.

After the layoffs, Supervisors Alderete and Diaz performed Urzua and Palafox's duties. In mid-August the payout employees were trained to perform the provider-contract services work. Thereafter, each employee in the merged department performed both PCS and payout work. Segobia testified that she immediately began processing provider timesheets and her training on the payout department's NOHO software system lasted roughly 60 to 90 minutes. Segobia testified that Urzua and Palafox could have been trained just as quickly.

5. Respondent's defense

Respondent contends that it had broad authority regarding layoffs and the assignment of job duties. Under Respondent's management rights clause it reserved, inter alia, the rights to: determine the size, number location, and function of its organizational units; maintain and improve efficiency of its operations, including the right to establish methods of operations; to determine the qualifications and selection for employment and jobs; to evaluate job performance; to relieve its employees of duties because of lack of work, reduced funding or other legitimate reasons; and to abolish positions because of lack of work, reduced funding, or other legitimate reasons.

Respondent further argues that Miner had no authority over the administrative employees and played no part in the decision to merge the provider-contract and payout departments or the resultant layoffs of the three employees. However, Miner apparently had the authority to hold a meeting of the administrative unit employees during worktime. Further, Respondent never disavowed Miner's statements. Miner testified that O'Connell was well aware of her strong feelings against the Union.

Respondent argues that antiunion sentiment played no part in the decision to layoff the employees or in the selection of which employees to layoff. Respondent contends that Urzua and Palafox were laid off because they were not sufficiently qualified to work in the payout department. Respondent contends that the payout process had changed from a 10-point key process to a NOHO software system and that the State had drastically changed the regulations for provider payouts. However, the NOHO software system was not vet fully operative. The payout employees were still calculating provider timesheets with a calculator and then entering the data into the NOHO program. As indicated above, Segobia needed only 60-90 minutes of training on the NOHO system. Finally, Respondent contends that the retention of Union Steward Segobia establishes that Respondent was not motivated by antiunion sentiment.

B. Analysis and Conclusions

1. Jean Miner's meeting with the administrative unit

As shown above, Miner passed out the union flyer stating that the flyer was what the employees were paying the Union for. When Miner attempted to give Palafox a copy of the flyer, Palafox said that she had already seen it. Miner replied "of course you did because you created it." Palafox answered that she had not and that Miner should talk to the Union. Miner then responded," You pay the Union." I find that by such conduct Miner unlawfully interrogated Palafox in violation of Section 8(a)(1) of the Act. "[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer." *Medcare Associates, Inc.*, 330 NLRB 935, 942 (2000), citing *NLRB v. McCullough Environmental Services*, 5 F.2d 923, 929 (5th Cir. 1993). That the interrogation was not in the form of a question does not alter the case.

Miner told the employees that she had gone through their personnel files and that the employees were uneducated. Miner said the employees had the best jobs that they ever had and were lucky to have their jobs. Segobia asked Miner if the meeting was related to her work and if she could be excused. Miner told Segobia that she could be excused. As Segobia left the meeting and Urzua and Palafox went with her. As the three employees were leaving, Miner declared, "There go your leaders. Miner was visibly shaken and an employee questioned her about it. Miner answered that she just "needed to hit something. I find that by such conduct, Miner unlawfully threatened employees in violation of Section 8(a)(1) of the Act. Miner's subjective state of mind is no defense.

2. The layoffs of Aurora Urzua and Griselda Palafox

In Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's Wright Line test in NLRB v. Transportation Mgt. Corp., 462 U.S. 393, 399-403 (1983). To sustain his initial burden, the General Counsel must show: (1) that the employee was engaged in union activity: (2) that the employer was aware of the activity; and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine. Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999), citing FPC Moldings, Inc. v. NLRB, 64 F.3d 935, 942 (4th Cir. 1995), enforcing 314 NLRB 1169 (1994). In order to make a prima facie case, the General Counsel must show: 1) Urzua and Palafox engaged in union or protected activity; 2) Respondent knew of that activity; 3) Respondent harbored animus against them because of the activity; 4) Respondent discriminated in terms of employment; and 5) the discipline was temporally connected to the protected activity. Goodyear Tire & Rubber Co., 312 NLRB 674 (1993).

I have found that Respondent has established strong economic justification for a merger of the provider-contract and payout departments. The record reveals, and the General Counsel concedes, that the merger of these two departments and the resultant layoff of three employees were necessary because of budgetary considerations. As stated earlier the issue is whether the selection of Urzua and Palafox for layoff over less senior employees was motivated by unlawful union considerations.

It is clear that Urzua and Palafox were engaged in union activities and that Respondent was aware of such activity. As stated earlier, Urzua and Palafox were engaged in the union organizing campaign. Palafox was an election observer for the Union. Thereafter, both Urzua and Palafox participated in the collective-bargaining negotiations on behalf of the administrative unit employees. Both employees assisted bargaining unit employees with grievances. More recently, on April 14, Miner delayed the start of her employee in order to wait for Palafox. After Palafox stated that she had already seen the union flyer, Miner suggested that Palafox had participated in the preparation of the flyer. After Segobia received permission to leave Miner's meeting, Palafox and Urzua left the meeting with Segobia. Miner then referred to these employees as leaders. On April 15, Urzua and Palafox participated in the union rally in front of Respondent's offices. Palafox was shown criticizing Respondent in the public television show which aired after the rally.

As stated above, Miner, in her 2002 letter, expressed animus against employees who assisted the Union, whom she referred to as "instigators," "malcontents," and "members of the new 'blackguard." I find particularly relevant her reference to "self serving (more highly compensated but disgruntled office workers) who derailed the organization." Urzua was active in the Union, on the Union's negotiating team, and was the highest paid office worker. On April 14, Miner expressed animus against the Union and contended that the Union engaged in hostile, adversarial, belligerent, and hateful behavior. As Urzua, Palafox, and Segobia left the April 14 meeting, Miner stated, "there go your leaders." At the instant hearing, Miner reaffirmed her antiunion sentiments expressed in her 2002 letter and at the April 14 meeting.

I find further evidence of union animus in O'Connell's statement to Sanchez, on the day of the layoffs, that if Sanchez was sincere about negotiations, he should have picked up a telephone rather than picking up a bullhorn. Further, O'Connell charged that the Union had ruined Respondent's reputation. In addition, Guajardo in answering Urzua as to why she, the most senior employee, was laid off, mentioned that "staff talked" and made an unexplained reference to "retaliation."

Moreover, I find that Urzua was Respondent's senior employee and more familiar with the State's new regulations than any other employee. Further, she had previously worked in the payout department. While procedures in that department had been updated, there was no reason to believe that Urzua could

¹¹ Urzua testified that Miner did not merely hand her a copy of the letter but rather threw the letter at her.

not readily learn the new procedures. I find it significant that Alderete, the supervisor of the three PCS employees was not questioned as to whom Respondent should lay off and whom Respondent should retain. Further, there was no discussion with Diaz, the supervisor of the payout employees, as to which payout employees should be laid off or retained. It strains credibility to believe that in a reduction of force from 10 to 7 employees, Respondent would not discuss with its supervisors the relative qualifications of the employees. If Respondent was really concerned about qualifications, Guajardo would have discussed with the supervisors the relative merits of each employee. It seems clear that Guajardo had focused on laying off Urzua and Palafox before he discussed with the supervisors Respondent's plan to merge the provider-contracts and payout departments. Thus, the inference of unlawful motivation is strengthened by Guajardo's failure to consult with the employees' immediate Supervisor Alderete. In appropriate circumstances, the Board has regarded an employer's failure to consult with the immediate supervisor who is the most accurate source of pertinent information as evidence of discriminatory motivation. Lancer Corp., 271 NLRB 1426, 1427-1428 (1984); Williams Services, 302 NLRB 492 (1991). Here, Alderete admits that she was never asked which employee or employees should be laid off.

Guajardo started from the premise that the layoffs would come from the provider-contract department. I do not believe that Respondent was oblivious to the disparate impact on union supporters and senior employees this strategy would have. Such a starting point insured that leading union adherents would be laid off. Second, Guaiardo realized that Respondent needed to keep at least one employee with experience in the provider-contract department. Guajardo admitted that when he evaluated Urzua and Palafox he did not consider their employee performance appraisals, their lack of discipline, or their knowledge and skills in the provider-contract department. Instead, Guajardo merely compared Urzua and Palafox to Segobia. The sole criteria for finding that Segobia was more qualified that Urzua and Palafox was the recent performance of payout duties. Guajardo did not compare Urzua and Palafox to the less senior employees in the payout department. Rather, Respondent appears to have narrowly defined qualifications to mean experience in the payout department. Guajardo's approach would necessarily result in the layoff of Urzua and Palafox, two leading union adherents. Further, such an approach would demonstrate to employees and the Union that Respondent need not follow seniority in laying off employees. Respondent was well aware that these employees were not engaged in childcare, the primary consideration in layoffs. And Respondent was well aware that as to employees who are equally qualified, seniority is the determining factor. Respondent sought to send a message that it could avoid following seniority by asserting that a less senior employee was more qualified.

Respondent argues that its retention of Union Steward Segobia negates the notion that Urzua and Palafox were selected because of their union activities. However, a discriminatory motive otherwise established is not disproved by an employer's proof that it did not weed out all union adherents. *American Petrofina Co.*, 247 NLRB 183, 193 (1980); *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). It is not necessary that the antiunion reason for a layoff be the only one leading thereto. I find that antiunion hostility was the substantial or motivating element which prompted the selection of Urzua and Palafox for layoff.

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By threatening employees with reprisals for engaging in union activities, and by unlawfully interrogating employees about their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
- 4. By laying off Aurora Urzua and Griselda Palafox because of their union activities, Respondent violated Section 8(a)(3) and (1) of the Act
- 5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. The Respondent having discriminatorily laid off Urzua and Palafox, it must offer them full and immediate reinstatement to the positions they would have held, but for the discrimination against them. Further, Respondent shall be directed to make Urzua and Palafox whole for any and all loss of earnings and other rights, benefits and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest as provided in New Horizons for the Retarded, 283 NLRB 1173 (1987); see also, Florida Steel Corp., 231 NLRB 651 (1977), and Isis Plumbing Co., 139 NLRB 716 (1962).

Respondent must also be required to expunge any and all references to its unlawful layoff of Urzua and Palafox from its files and notify them in writing that this has been done and that the unlawful discharge will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended ¹³

¹² Such a redefinition would necessarily result in the layoff of at least two leading union adherents.

¹³ All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Children's Services International, Inc., Salinas, California, its officers agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Laying off employees in order to discourage union activities.
- (b) Threatening employees with reprisals for engaging in union activities.
- (c) Unlawfully interrogating employees about their union activities.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer reinstatement to Aurora Urzua and Griselda Palafox to the positions they would have held, but for their unlawful layoffs.
- (b) Make whole Aurora Urzua and Griselda Palafox for any and all losses incurred as a result of Respondent's unlawful layoffs, with interest, as provided in the section of this Decision entitled "The Remedy."
- (c) Within 14 days from the date of this Order, expunge from its files any and all references to the layoffs of Urzua and Palafox and notify them in writing that this has been done and that Respondent's layoff of them will not be used against them in any future personnel actions.
- (d) Preserve, and within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its Salinas, California facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the

event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since April 14, 2004.

(e) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, San Francisco, CA April 19, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminate in the selection of employees for layoff in order to discourage union activities.

WE WILL NOT threaten employees with reprisals in order to discourage union activities.

WE WILL NOT unlawfully interrogate employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Aurora Urzua and Griselda Palafox to the positions they would have held, but for their unlawful layoffs.

WE WILL make whole Aurora Urzua and Griselda Palafox for any and all losses incurred as a result of our unlawful layoff of them, with interest.

WE WILL expunge from our files any and all references to the layoff of Urzua and Palafox and notify them in writing that this has been done and that the fact of these layoffs will not be used against them in any future personnel actions.

CHILDREN'S SERVICES INTERNATIONAL, INC.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."